03-1679 (2)

No. ___

Supreme Court, U.S.
FILED
JUL 22 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

VICTOR H. MORENO, III, individually and on behalf of others similarly situated; ANA LAURA MORENO, individually and on behalf of others similarly situated,
Petitioners,

v.

SUMMIT MORTGAGE CORPORATION; FIRST NATIONWIDE MORTGAGE CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT FIRST NATIONWIDE MORTGAGE CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RECEIVED
JUL 23 2004
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MITCHEL H. KIDER
DONALD C. BROWN, JR.
BRUCE E. ALEXANDER *
WEINER BRODSKY SIDMAN KIDER PC
1300 19th Street, NW., Fifth Floor
Washington, DC 20036

* Counsel of Record

Attorneys for Respondent First Nationwide Mortgage Corporation

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Should this Court review a court of appeals' decision holding that when a mortgage lender originates, closes and funds a mortgage loan in its own name, using its own line of credit, and then sells the closed loan to a third party, the sale is a secondary mortgage market transaction beyond the scope of RESPA? The court of appeals' decision is consistent with the only other circuit to have considered this issue and with the Department of Housing and Urban Development's interpretation of its own regulations.

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceeding in the United States Court of Appeals for the Fifth Circuit.

CORPORATE DISCLOSURE

First Nationwide Mortgage Corporation, now known as CitiMortgage, Inc., is owned by Citigroup, Inc. Citigroup, Inc.'s shares are publicly traded on the New York Stock Exchange.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE	ii
STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
COUNTERSTATEMENT OF THE CASE	2
A. The Secondary Mortgage Market	2
B. The Relevant Statutory and Regulatory Framework	3
C. Facts and Proceedings Below	5
1. Factual Background	5
2. Procedural History	6
a. The District Court Proceedings	6
b. The Fifth Circuit Opinion	8
REASONS FOR DENYING THE PETITION	9
I. THE FIFTH CIRCUIT'S OPINION IS CONSISTENT WITH THE DECISION OF THE ONLY OTHER CIRCUIT COURT TO ADDRESS THIS ISSUE	9
II. THE CIRCUIT COURTS' DECISIONS ARE CONSISTENT WITH HUD'S INTERPRETATION OF ITS OWN REGULATIONS	11
III. THE PETITION DOES NOT PRESENT AN IMPORTANT QUESTION FOR REVIEW	13
CONCLUSION	15
APPENDIX OF RELEVANT PROVISIONS	1a

TABLE OF AUTHORITIES

CASES — Page

Bowles v. Seminole Rock Co., 325 U.S. 410, 414, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945) 13

Chandler v. Northwest Bank Minnesota, N.A., 137 F.3d 1053 (8th Cir. 1998) ..... *passim*

Glover v. Standard Federal Bank, 283 F.3d 953 (8th Cir. 2002) 7

Heimmermann v. First Union Mortgage Corp., 305 F.3d 1257 (11th Cir. 2002) 7

Schuetz v. Banc One Mortgage Corp., 292 F.3d 1004 (9th Cir. 2002) 7

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512, 129 L. Ed. 2d 405, 114 S. Ct. 2381 (1994) ... 12

STATUTES

12 U.S.C. § 2601(a) 3

12 U.S.C. § 2617(a) 3

REGULATIONS

24 C.F.R. § 3500.2(b) 4

24 C.F.R. § 3500.5 4

24 C.F.R. pt. 3500 app. B, illus. 5 11

TREATISES

Paul Barron & Michael A. Berenson, *Federal Regulation of Real Estate and Mortgage Lending* § 2.16 (4th ed. 2001) 11

Kenneth G. Lore & Cameron L. Cowan, *Mortgage-Backed Securities* § 1.1 (2003 ed.) 3

IN THE

Supreme Court of the United States

No. ___

VICTOR H. MORENO, III, individually and on behalf of others similarly situated; ANA LAURA MORENO, individually and on behalf of others similarly situated,
Petitioners,

v.

SUMMIT MORTGAGE CORPORATION; FIRST NATIONWIDE MORTGAGE CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT FIRST NATIONWIDE MORTGAGE CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The text of the following provisions appears in the Petitioner's Appendix ("Pet. App."):

12 U.S.C. § 2601(a)	Pet. App. 27a
12 U.S.C. § 2607(b)	Pet. App. 28a-30a
24 CFR § 3500.5(7)	Pet. App. 34(a).

The text of the following provision appears in the Respondent's Appendix ("Resp. App."):

12 U.S.C. § 2617 Resp. App. 1a.

COUNTERSTATEMENT OF THE CASE

This case concerns whether the sale of petitioners' closed mortgage loan from Summit Mortgage Corporation ("Summit") to First Nationwide Mortgage Corporation ("First Nationwide") was exempt from the requirements of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.* The Department of Housing and Urban Development ("HUD"), the federal agency charged with administering RESPA, has provided that the sales of mortgage loans on the secondary mortgage market are exempt from RESPA. Applying HUD's test, the Fifth Circuit decided that the sale of petitioners' mortgage loan was a secondary market sale and thus exempt from RESPA.

A. The Secondary Mortgage Market

The secondary mortgage market is a crucial component of the home mortgage system in the United States. Mortgages no longer are made primarily by savings and loan institutions with lending capacity constrained by the amount of deposits generally on hand. Today, the market is typically characterized by investors that do not lend money directly to home buyers, but instead buy mortgages from a variety of institutions that in turn make home loans available to borrowers. By structuring this secondary market to promote efficiency, certainty, and standardization, these investors ensure that mortgage funds are both consistently available and uniquely affordable to lenders. As one treatise explains:

> The secondary mortgage market is a network of lenders who sell and investors who buy existing mortgages or mortgage-backed securities. This infusion of capital from investors provides mortgage lenders such as banks,

> thrifts, mortgage bankers and other loan originators with a market for their interests. The result of this paradigm can best be described as a win-win situation: lenders obtain a market for their investments and increased capital from which to make future loans, while borrowers receive the benefits of lower costs of borrowing occasioned by the ability of lenders to sell their mortgage interests on the secondary market.

Kenneth G. Lore & Cameron L. Cowan, *Mortgage-Backed Securities* § 1.1 (2003 ed.).

The secondary market includes investors such as the quasi-governmental Federal National Mortgage Association ("Fannie Mae"), Federal Home Loan Mortgage Corporation ("Freddie Mac"), and Government National Mortgage Association ("Ginnie Mae"). It is also driven by other investors, such as various pension funds, insurance companies, securities dealers, and other financial institutions. For lenders choosing not to hold a loan in their own portfolio, selling loans to investors enables the lenders to replenish their funds so they can turn around and lend more money to other home buyers.

Recognizing the importance of the secondary mortgage market, HUD, as discussed more fully below, has issued regulations exempting secondary mortgage market transactions from the scope of RESPA.

B. The Relevant Statutory and Regulatory Framework

In 1974, Congress enacted RESPA to protect home borrowers from unnecessarily high settlement charges. 12 U.S.C. § 2601(a). Pet. App. 27a. Congress authorized HUD to administer RESPA and promulgate regulations for doing so, including exempting classes of transactions. 12 U.S.C. § 2617(a). Resp. App. 1a. Acting within this grant of authority, HUD promulgated 24 C.F.R. pt. 3500, commonly known as Regulation X.

Regulation X specifically exempts from the provisions of RESPA, fees and charges paid in connection with the sale or transfer of mortgage loans on the secondary market. Regulation X states in relevant part:

> (a) Applicability: RESPA and this part apply to all federally related mortgage loans, except for the exemptions provided in paragraph (b) of this section.
>
> (b) Exemptions
>
> * * * *
>
> (7) Secondary market transactions. A bona fide transfer of a loan obligation in the secondary market is not covered by RESPA and this part, except as set forth in section 6 of RESPA (12 U.S.C. 2605) and § 3500.21. In determining what constitutes a bona fide transfer, HUD will consider the real source of funding and the real interest of the funding lender. Mortgage broker transactions that are table-funded are not secondary market transactions. . . .

24 C.F.R. § 3500.5.[1] Pet. App. 34a. This section both exempts secondary market transactions from RESPA and sets out the test for deciding whether a particular transaction is a secondary market sale, *i.e.*, the real source of the funds used to close the mortgage loan and the real interest of the funding lender.

---

[1] In turn, HUD defines "table funding" as:

> a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds.

24 C.F.R. § 3500.2(b). Pet. App. 45a.

C. Facts and Proceedings Below

1. *Factual Background*

Summit Mortgage is in the business of originating mortgage loans. Pet. App. 14a. Summit takes applications from potential borrowers, performs or arranges for all the work necessary to evaluate the borrowers' applications and the security for the proposed loan. *Id.* If the loan is approved Summit provides the necessary loan closing documents and funds and closes the loan in its own name. Pet. App. 14a-15a. Summit does not retain ownership of the loans that it funds. Pet. App. 2a. Instead, Summit sells the closed loans to investors such as First Nationwide. *Id.* Summit and First Nationwide entered into a contractual agreement governing the potential sale of mortgage loans from Summit to First Nationwide. Pet. App. 3a. Under this agreement, if Summit wanted to sell a prospective loan to First Nationwide, it first submitted a request to First Nationwide to commit to purchase the loan. *Id.* If Summit and First Nationwide agreed on a purchase price, First Nationwide issued a commitment confirmation. *Id.* Prior to issuance of the commitment, Summit was not obligated to sell, or even offer, its mortgage loans to First Nationwide. *Id.* Once the commitment issued, however, Summit had to use its best efforts to close the loan and had to tender it for purchase by First Nationwide. *Id.* Even then, First Nationwide was not required to purchase the loan; it could reject it for failure to meet the requirements set forth in its "Lender Guide." After a mortgage loan closed, Summit delivered the loan file to First Nationwide for it to make its purchase decision. *Id.*

For the loans it originated, Summit borrowed the money to fund them from its warehouse lender, Bank United, pursuant to an agreement between Summit and Bank United. Pet. App. 3a. Under this agreement, Summit was the only party responsible for repaying Bank United. Pet. App. 7a.

In early 2001, the Morenos applied to Summit for a federally insured mortgage loan of $63,500, with an eight percent interest rate, for the purchase of a home in Texas. Pet. App. 3a. Summit submitted a purchase request to First Nationwide for the Morenos' loan, and on March 14, 2001, First Nationwide executed a commitment confirmation to Summit for the Morenos' loan. Pet. App. 4a. Upon receipt of the commitment, Summit requested funds from Bank United to fund the loan. *Id.* On March 19, 2001, Summit delivered a copy of First Nationwide's commitment confirmation to Bank United. *Id.* Around this same time, Bank United delivered to Summit the funds needed for the mortgage loan. Upon receipt of the funds from Bank United, Summit was obligated to repay the amount of the mortgage loan ($63,500) with interest (total of $64,452). *Id.*

On either March 19 or 20, 2001 (the exact date is not relevant), the Morenos and Summit closed the mortgage loan. *Id.* At closing, the Morenos signed a promissory note with Summit as the payor and a deed with Summit as the beneficiary; they also signed a letter instructing them to send all tax notices received to First Nationwide. *Id.*

On March 19, 2001, Summit assigned the loan to First Nationwide. First Nationwide, however, did not send the funds to pay for the purchase of the loan until nearly three weeks later, on April 10, 2001. By letter that same day, First Nationwide advised the Morenos of its purchase and that it would be servicing their loan. *Id.*

2. *Procedural History*

a. The District Court Proceedings

The Morenos initially filed their suit in Texas state court, contending, *inter alia*, that Summit and First Nationwide had violated Section 8 of RESPA. Pet. App. 4a. The Morenos alleged that the fee that First Nationwide paid Summit for

their mortgage loan should be considered an illegal referral fee under RESPA.[2] *Id.* After the case was removed to federal court, the Morenos eliminated all of their claims except their RESPA claim. Pet. App. 5a. First Nationwide and Summit moved for summary judgment on that remaining claim, contending that First Nationwide's acquisition of the Moreno loan was a secondary market transaction and, thus, outside the scope of RESPA. Pet. App. 12a. On November 15, 2002, the magistrate judge recommended that summary judgment be entered in favor of First Nationwide and Summit.

The magistrate judge decided:

> The summary judgment evidence presented shows positively that Summit Mortgage originated the Morenos' loan, funded it with its own funds received through an independent line of credit from a warehouse lender and closed the loan in its own name. This is sufficient to establish that the sale of the loan to First Nationwide was a bona fide secondary market transaction which avoids the restrictions of Section 8 of RESPA.

Pet. App. 18a-19a.

---

[2] The Morenos contend that First Nationwide's payment to Summit should be considered a yield spread premium. A yield spread premium, which is compensation paid by a mortgage lender to a mortgage broker for a loan, is not *per se* illegal. The issue of whether an individual yield spread premium is legal is determined by a two-part HUD test that focuses on whether the mortgage broker performed services and, if so, whether the broker's overall compensation, including any yield spread premium, was reasonable. *E.g.*, *Glover v. Standard Federal Bank*, 283 F.3d 953 (8th Cir. 2002); *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004 (9th Cir. 2002); *Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257 (11th Cir. 2002). Even if the Morenos could demonstrate that the sale of their loan was subject to RESPA, that would not, by itself, validate their claim.

The magistrate judge found that even if Summit had executed an assignment of the Morenos' loan to First Nationwide prior to loan closing and obtained its warehouse loan based upon this assignment, there still was no genuine issue of fact to suggest that First Nationwide was the true source of the monies used to fund the Morenos' loan. Pet. App. 19a. The magistrate judge noted that Summit did not actually receive any funds from First Nationwide until April 10, 2001, weeks after loan closing. *Id.*

On January 3, 2003, the district court adopted the magistrate's recommendation. Pet. App. 25a-26a.

b. The Fifth Circuit Opinion

The Morenos appealed to the United States Court of Appeals for the Fifth Circuit. On March 23, 2004, the Fifth Circuit affirmed the grant of summary judgment in favor of First Nationwide and Summit. Pet. App. 2a.

The Fifth Circuit also held that Summit's sale of the Morenos' loan to First Nationwide was a bona fide secondary market transaction under Regulation X. Pet. App. 7a. The Fifth Circuit noted that (1) Summit borrowed the money to fund the Morenos' loan through its established line of credit with Bank United; (2) Summit closed the loan in its name; and (3) Summit was the only party responsible for repaying the loan and thus the real source of the funds for the Morenos' mortgage loan. *Id.*

Additionally, the Fifth Circuit pointed out that the agreement between Summit and First Nationwide for the purchase of the Morenos' mortgage loan had no effect on Summit's status as being the real source of the funds and having the real interest in the transaction. Pet. App. 7a. The Fifth Circuit explained that First Nationwide was never obligated to Bank United to repay the funds borrowed by Summit. First Nationwide's only obligation was to pay

Summit the price—agreed upon between First Nationwide and Summit—for the closed mortgage loan. *Id.*

REASONS FOR DENYING THE PETITION

Petitioners present no valid reason why this Court should review the Fifth Circuit's decision. The Fifth Circuit's ruling is consistent with (1) the only other circuit court to address this issue and (2) HUD's interpretation of its own regulation. Additionally, petitioners' claim does not present an important of issue of federal law that would merit this Court's consideration.

I. THE FIFTH CIRCUIT'S OPINION IS CONSISTENT WITH THE DECISION OF THE ONLY OTHER CIRCUIT COURT OF APPEALS TO CONSIDER THIS ISSUE

The Fifth Circuit's conclusion that Summit's sale of the Moreno loan is a secondary market transaction outside RESPA's purview is wholly consistent with the decision of the only other circuit court of appeals that has confronted this question, *Chandler v. Northwest Bank Minnesota, N.A.*, 137 F.3d 1053 (8th Cir. 1998).

In making its decision, the Fifth Circuit correctly focused on HUD's test for determining a secondary market transaction: the "real source of funding and the real interest of the funding lender." 24 C.F.R. § 3500.5(b)(7). Applying this test, the Fifth Circuit quickly concluded that the sale of the Morenos' loan was a secondary market transaction because (1) Summit borrowed the money to fund the Morenos' loan through its established line of credit with its warehouse lender, Bank United; (2) Summit closed the loan in its name; and (3) Summit was the real source of funds for the mortgage loan because it was the only party responsible for repaying Bank United. Pet. App.7a. The Fifth Circuit noted that the agreement between First Nationwide and

Summit regarding the Moreno loan—even if it was made before closing—did not alter Summit's status as the real source of the funds. *Id.* The Fifth Circuit explained that this was so because First Nationwide had no obligation to repay Bank United for the monies Summit borrowed to fund the Morenos' loan. *Id.*

The Fifth Circuit's ruling below is completely in line with the decision of the Eighth Circuit in *Chandler*. Indeed, the Fifth Circuit explicitly embraced the reasoning of the *Chandler* court. Pet. App. 7a. In *Chandler*, like the case here, the plaintiffs entered into a mortgage loan transaction with a lender that closed the loan in its own name and funded the loan through its pre-existing line of credit with its warehouse banker. 137 F.3d at 1055. Like the case here, the *Chandler* plaintiffs signed a notice of assignment that indicated that the servicing rights to their loan were being transferred. *Id.* at 1054. In *Chandler*, the lender that closed and funded the mortgage loan sold that loan five days later—here it was three weeks after loan closing. *Id.* at 1055. In *Chandler*, like the case here, the closed and funded mortgage loan was sold in accordance with a *preexisting* purchase and sales agreement. *Id.* at 1055, 1057. In *Chandler*, like the case here, the funds used to purchase the loan were sent to the originating lender's warehouse bank account. *Id.* at 1055. Most significantly—the *Chandler* plaintiffs like the Morenos here—contended that these facts meant that their loan had been "sold" prior to closing and that the acquiring lender was the actual source of funding for their mortgage loan. *Id.*

The Eighth Circuit rejected the plaintiffs' contention that these allegations raised a genuine issue of material fact and affirmed the district court's award of summary judgment to the defendant lenders. *Id.* at 1057. The Eighth Circuit found that the *Chandler* plaintiffs had failed to produce any evidence that the funds disbursed at the closing of their mortgage loan came from any other source than the originating lender.

II. THE CIRCUIT COURTS' DECISIONS ARE CONSISTENT WITH HUD'S INTERPRETATION OF ITS OWN REGULATIONS

The Fifth Circuit's decision below and the Eighth Circuit's decision in *Chandler* are supported by HUD's interpretation of its own regulations.

In its comments and illustrations to Regulation X, HUD provides this illustration of a secondary market transaction:

> Illustration 5
>
> *Facts*:
>
> A, a "mortgage originator," receives loan applications, funds the loans with its own money or with a wholesale line of credit for which A is liable, and closes the loans in A's own name. Subsequently, B, a mortgage lender, purchases the loans and compensates A for the value of the loans, as well as for any mortgage servicing rights.
>
> *Comments*:
>
> Compensation for the sale of a mortgage loan and servicing rights constitutes a secondary market transaction, rather than a referral fee, and is beyond the scope of Section 8 of RESPA. For purpose of Section 8, in determining whether a bona fide transfer of the loan obligation has taken place, HUD examines the real source of funding, and the real interest of the named settlement lender.

24 C.F.R. pt. 3500 app. B ("Illustrations of Requirements of RESPA").

Illustration 5 sets out three requirements for a transaction to be a secondary market transaction: (1) the mortgage originator must fund the loan from its own money or from a line of credit for which it is liable; (2) close the loan in its own name; and (3) sell it to a third party. Paul Barron &

Michael A. Berenson, *Federal Regulation of Real Estate and Mortgage Lending* § 2.16 (4th ed. 2001).

As the Fifth Circuit stated, the factual scenario associated with the Moreno loan meets the requirements of the illustration. Pet. App. 8a. Summit was the "mortgage originator" and funded the Morenos' loan through its own line of credit with its wholesale lender. *Id.* First Nationwide was the mortgage lender that purchased the loan from Summit and compensated Summit for the loan. *Id.* Therefore, the Fifth Circuit concluded, the sale by Summit to First Nationwide was a secondary market transaction. *Id.*

Petitioners seek to muddy the waters by complaining that Illustration 5 does not apply because, in their view, the sale of the Moreno loan was "pre-arranged." This argument fails, factually and legally. The facts, as stated by the Fifth Circuit, demonstrate that First Nationwide was not obligated to purchase the Morenos' loan from Summit prior to loan closing. Pet. App. 3a. After loan closing, Summit delivered the closed file to First Nationwide for review. *Id.* First Nationwide did not make its purchase decision until after this review. *Id.* Additionally, petitioners cannot escape the conclusion that Summit and only Summit was the real source of funding for their mortgage loan. As the Fifth Circuit pointed out, Summit borrowed the money to fund the Morenos' loan through its line of credit with Bank United. Pet. App. 7a. First Nationwide was not obligated to Bank United to repay the money borrowed by Summit. *Id.* "Summit was the only party responsible for repaying Bank United and was therefore the real source of funds for the mortgage loan." *Id.*

Therefore, HUD's interpretation of its own regulations shows the mortgage sale at issue here is a secondary market transaction. That interpretation is entitled to substantial deference. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 129 L. Ed. 2d 405, 114 S. Ct. 2381 (1994). In construing

administrative regulations, "the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulations.'" *Id.* (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945)).

III. THE PETITION DOES NOT PRESENT AN IMPORTANT QUESTION FOR REVIEW

Finally, despite the petitioners' assertions to the contrary, this case does not present the type of important legal issue that requires this Court's review.

First, the statutory and regulatory framework required to resolve the issue is not in dispute. There is no question that HUD, acting within the authority delegated to it by Congress, has exempted secondary market transactions from RESPA. There also is no question regarding the legal framework for determining a secondary market transaction. HUD's test focuses on the source of the funds used to close the mortgage loan.

Second, applying this test, two circuit courts of appeal have decided that when a lender originates a loan, funds the loan with monies from a line of credit for which it is liable, closes the loan in its own name and then sells the loan to a third party, the sale is a secondary market transaction exempt from RESPA, even if the sale results from a pre-existing arrangement. Besides being consistent with each other, these rulings also are fully in line with HUD's own interpretation of its regulations regarding secondary market transactions.

The petition simply does not present the type of unsettled jurisprudence that would require this Court's intervention. Indeed, this is underscored by petitioners' failure to present *any* authority from *any* court to support their position except the lone dissenting opinion in *Chandler*. Petitioners acknowl-

edge that "reliance on a sole dissenting voice in seeking this Court's intervention might be considered foolish." On that point, we agree.

Unable to suggest any jurisprudential conflict, petitioners resort to contending that the Fifth Circuit simply got it wrong by (1) failing to give effect to Congress' intent or (2) endorsing a "sham transaction." Even if these claims were true, they do not present the type of compelling federal question that would merit this Court's review. Moreover, they are baseless. First, petitioners' claim that the Fifth Circuit failed to give effect to Congress' intent is incorrect. In approving RESPA, Congress explicitly granted HUD the authority to make exceptions to RESPA. Acting under this authority, HUD exempted bona fide secondary market transactions and provided a test for deciding such transactions. The Fifth Circuit's ruling is based upon HUD's regulations and test. Therefore, the Fifth Circuit's ruling explicitly gives effect to the appropriate statutory and regulatory scheme.

Additionally, petitioners' argument that the Fifth Circuit blessed a "sham transaction" is equally baseless. Petitioners contend that First Nationwide—not Summit—had the real interest in the Morenos' loan because they contend that before the Morenos' loan closed: (1) the Morenos' mortgage was assigned to First Nationwide; (2) First Nationwide, not Summit, was listed on the insurance policy relating to the mortgage; (3) tax notices were to be sent to First Nationwide, and (4) the original note was endorsed in blank. Both the Fifth Circuit and the District Court correctly brushed past these factors as insubstantial, finding that even if true they failed to raise any genuine issue of material fact with regard to Summit being the "real source of funds" used to close the Morenos' mortgage loan.

Try as they might, through two courts so far, petitioners have not been able to explain away that (1) Summit closed

the Morenos' mortgage loan in its own name and to do so, used funds borrowed from its own warehouse lender; (2) Summit was the only party responsible for repaying those funds; (3) First Nationwide had no obligation to repay the money to Summit's warehouse lender; and (4) First Nationwide sent the funds to Summit to purchase the Morenos' loan nearly three weeks after the loan closed. Based upon these factors, the Fifth Circuit, as well as the District Court, correctly found that petitioners were unable to dispute that Summit was the actual source for the funds used to close the Morenos' loan.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MITCHEL H. KIDER
DONALD C. BROWN, JR.
BRUCE E. ALEXANDER *
WEINER BRODSKY SIDMAN KIDER PC
1300 19th Street, NW., Fifth Floor
Washington, DC 20036

* Counsel of Record

Attorneys for Respondent
First Nationwide Mortgage Corporation

APPENDIX

APPENDIX OF RELEVANT PROVISIONS

12 U.S.C. § 2617. Authority of Secretary

(a) Issuance of regulations; exemptions

The Secretary is authorized to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this chapter.

(b) Liability for acts done in good faith in conformity with rule, regulation, or interpretation

No provision of this chapter or the laws of any State imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Secretary or the Attorney General, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(c) Investigations; hearings; failure to obey order; contempt

(1) The Secretary may investigate any facts, conditions, practices, or matters that may be deemed necessary or proper to aid in the enforcement of the provisions of this chapter, in prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning real estate settlement practices. To aid in the investigations, the Secretary is authorized to hold such hearings, administer such oaths, and require by subpena the attendance and testimony of such witnesses and production of such documents as the Secretary deems advisable.

(2) Any district court of the United States within the jurisdiction of which an inquiry is carried on may, in the case of contumacy or refusal to obey a subpena of the Secretary issued under this section, issue an order requiring compliance

therewith; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) Delay of effectiveness of recent final regulation relating to payments to employees

(1) In general

The amendment to part 3500 of title 24 of the Code of Federal Regulations contained in the final regulation prescribed by the Secretary and published in the Federal Register on June 7, 1996, which will, as of the effective date of such amendment—(A) eliminate the exemption for payments by an employer to employees of such employer for referral activities which is currently codified as section 3500.14(g)(1)(vii) of such title 24; and (B) replace such exemption with a more limited exemption in new clauses (vii), (viii), and (ix) of section 3500.14 of such title 24, shall not take effect before July 31, 1997.

(2) Continuation of prior rule

The regulation codified as section 3500.14(g)(1)(vii) of title 24 of the Code of Federal Regulations, relating to employer-employee payments, as in effect on May 1, 1996, shall remain in effect until the date the amendment referred to in paragraph (1) takes effect in accordance with such paragraph.

(3) Public notice of effective date

The Secretary shall provide public notice of the date on which the amendment referred to in paragraph (1) will take effect in accordance with such paragraph not less than 90 days and not more than 180 days before such effective date.